

## Commissioner of Income Tax Vs Mepco Industries Limited

**Court:** Madras High Court

**Date of Decision:** Nov. 2, 2006

**Acts Referred:** Income Tax Act, 1961 " Section 120, 129, 143(1), 143(2), 144A

**Citation:** (2007) 207 CTR 642 : (2007) 294 ITR 121

**Hon'ble Judges:** P.P.S. Janarthana Raja, J; P.D. Dinakaran, J

**Bench:** Division Bench

**Advocate:** J. Narayanasamy, Jr. SC. for IT, for the Appellant;

**Final Decision:** Dismissed

### Judgement

P.D. Dinakaran, J.

The above tax case appeal is directed against the order of the Income Tax Appellate Tribunal dated 25.11.2005 made

in ITA Nos.1901/Mds/2003 for the assessment year 1999-2000 and the following substantial questions of law have been raised for consideration:

1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the order u/s 263 is ambivalent as to whether the order

is erroneous and prejudicial or not merely because the CIT sent back the matter to the assessing officer to pass fresh orders after giving

opportunity to the assessee?

2. Whether in the facts and circumstances of the case, an order of revision u/s 263 should come to a final conclusion and should not remit the

matter to the assessing officer?

2. The brief facts of the case, as stated, are as follows:

2.1. The relevant assessment year with which we are concerned is 1999-2000. The assessee company filed its return of income admitting the

income of Rs. 39,36,400/-. The return was processed u/s 143(1)(a) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The case

of assessee was selected for scrutiny, notice u/s 143(2) of the Act was issued and after hearing the assessee, the assessment was completed

accepting the return filed by the assessee.

2.2. The Commissioner of Income Tax, finding that inter-unit loss was not adjusted against the profit for the purpose of allowing deduction u/s

80IA of the Act, issued a notice u/s 263 of the Act to the assessee. The assessee objected to the same contending that as per the provisions of

Section 80AB of the Act, the only rider is that the deductions contemplated under Chapter VIA cannot be carried forward to succeeding years

and the quantum of deduction shall be computed as if such eligible business is the only source of income of the assessee and hence, Section 80AB

of the Act will not restrict the relief u/s 80IA of the Act.

2.3. The Commissioner of Income Tax, considering the objection raised by the assessee, remitted the matter to the assessing officer for fresh

assessment. The relevant portion of the order of the Commissioner of Income Tax dated 2.9.2003 reads as under:

It would appear that since the issues raised before me by the CA have not been considered at any stage by the assessing officer, the matter has to

go back to him for appropriate adjudication as per law. The assessing officer should give fresh opportunity to the assessee before restricting the

claim of the assessee u/s 80IA by relying upon the decisions of the Hon"ble Supreme Court and the High Court in Commissioner of Income Tax,

Tamil Nadu-V, Madras Vs. Kotagiri Industrial Co-operative Tea Factory Ltd., Kotagiri, and Commissioner of Income Tax Vs. Sundaravel Match

Industries (P.) Ltd., and he should also duly weigh the averments of the assessee in the matter. The assessing officer should pass fresh assessment

order with regard to the issue of disallowing the excess claim of the deduction u/s 80IA which works out to Rs. 3581202.

2.4. Exasperated by the said order of Commissioner of Income Tax, the assessee preferred an appeal before the Appellate Tribunal, which, by

order dated 25.11.2005, following the unreported judgment of this Court in Commissioner of Income Tax v. Smt. D. Valliammal dated

27.6.1996, set aside the order of Commissioner of Income Tax holding that the Commissioner of Income Tax has committed an error in invoking

the jurisdiction u/s 263 of the Act. Hence, the present appeal by the Revenue raising the questions of law referred to above.

3. Both the questions, in our considered opinion, revolve on the power of the Commissioner of Income Tax in invoking jurisdiction u/s 263 of the

Act which reads as follows:

263. Revision of orders prejudicial to revenue.--(1) The Commissioner may call for and examine the record of any proceeding under this Act, and

if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he

may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such

order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and

directing a fresh assessment.

Explanation.--For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,--

(a) an order passed on or before or after the 1st day of June, 1988, by the Assessing Officer shall include--

(i) an order of assessment made by the Assistant Commissioner \*or Deputy Commissioner or the Income Tax Officer on the basis off the

directions issued by the \*Joint Commissioner u/s 144A;

(ii) an order made by the \*Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred

on, or assigned to him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner

authorised by the Board in this behalf u/s 120;

(b) ""record"" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of

examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal, filed on or

before or after the 1st day of June, 1988 the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have

extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under Sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be

revised was passed.

(3) Notwithstanding anything contained in Sub-section (2), an order in revision under this section may be passed at any time in the case of an order

which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High

Court or the Supreme Court.

Explanation.--In computing the period of limitation for the purposes of Sub-section (2), the time taken in giving an opportunity to the assessee to

be re-heard under the proviso to Section 129 and any period during which any proceeding under this section is stayed by an order or injunction of

any court shall be excluded.

4. The Apex Court in MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, , after considering the power and

jurisdiction of Commissioner of Income Tax u/s 263 of the Act and the meaning of the phrase, "prejudicial to the Revenue" found in Section 263 of

the Act, held as follows:

A bare reading of Section 263 of the Income Tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the

Commissioner suo motu under it, is that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the

Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous;

and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the Income Tax Officer is erroneous but is not

prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to Section 263(1) of the Act. The

provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is

erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the

order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The

phrase ""prejudicial to the interests of the Revenue"" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is

of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and

this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a

person, it will certainly be prejudicial to the interests of the Revenue. The phrase ""prejudicial to the interests of the Revenue"" has to be read in

conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing

Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses

permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income Tax Officer has taken one view with

which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view

taken by the Income Tax Officer is unsustainable in law.

5. As held by the Apex Court in Malabar Industrial Co. Ltd. Case, cited supra, every loss of revenue as a consequence of an order of the

Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the

courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income Tax Officer has taken one view

with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view

taken by the Income Tax Officer is unsustainable in law.

6. In the instant case, the Commissioner of Income Tax, while exercising power u/s 263 of the Act, had not rendered an independent finding to the

effect that the course adopted by the assessing officer is neither permissible, nor the view taken by the assessing officer resulted in the loss of

revenue which is prejudicial to the interest of the Revenue. In the absence of any such finding, the Appellate Tribunal, in our considered opinion, is

right in setting aside the order of the Commissioner of Income Tax.

7. Even on merits, on the point that inter-unit loss was not adjusted against the profit for the purpose of allowing deduction u/s 80IA of the Act,

there are two views possible; one in favour of the Revenue and the other in favour of the assessee.

(i) In favour of the Revenue:

(a) Kotagiri Industrial Co-operative Tea Factory Ltd. 224 ITR 604

In this case, the Supreme Court, while interpreting the expression, "gross total income" in clause (5) of Section 80B of the Act for the purpose of

Chapter VI-A of the Act, held that it is necessary, for the purpose of making deduction u/s 80P of the Act, to determine the gross total income in

accordance with the other provisions of the Act, which means that the gross total income must be determined by setting off against the income the

business losses of the earlier years as required u/s 72 of the Act, before allowing deduction u/s 80P.

(b) COMMISSIONER OF INCOME TAX Vs. SUNDARAVEL MATCH INDUSTRIES (P) LTD.,

In this case, this Court held that losses should be set off against the profits of the industrial undertaking before granting the deduction u/s 80HH of

the Income Tax Act, 1961, in view of the specific provision found in Section 80AB of the Act.

(ii) in favour of the assessee:

Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd., Kodialball, Mangalore,

In this case, the Apex Court held that in the application of Section 80E of the Income Tax Act, 1961, the profits and gains earned by one priority

industry (mentioned in that section) cannot be reduced by the loss suffered by any other industry or industries owned by the assessee.

8. Therefore, on the facts of the case, when there are two views are possible and it is not the case of the Revenue that the view taken by the

assessing officer is not permissible in law, the Commissioner of Income Tax is not justified in invoking the jurisdiction u/s 263 of the Act.

9. Hence, we do not find any question of law, much less a substantial question of law that arises out of the order of the Appellate Tribunal.

Accordingly, the tax case appeal stands dismissed. No costs.